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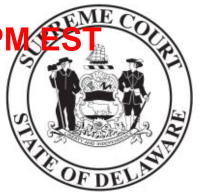

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JONATHAN URDAN, an individual and WILLIAM WOODWARD, an individual,	)	
Plaintiffs-Below, Appellants,	)	No. 423,2019
v.	)	Court Below: The Court of Chancery of The State of Delaware
WR CAPITAL PARTNERS, LLC, a Delaware limited liability company, WR E3 HOLDINGS, LLC, a Delaware limited liability company, HENRI TALERMAN, an individual, and FRANK E. WALSH III, an individual,	)	C. A. No. 2018-0343-JTL
Defendants-Below, Appellees,	)	
and	)	
ENERGY EFFICIENT EQUITY, INC., a Delaware corporation,	)	
Nominal Defendant-Below.	)	

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

On August 31, 2018, Plaintiffs Jonathan Urdan and William Woodward ("Plaintiffs") sold their Energy Efficient Equity, Inc. ("E3") shares back to the company as part of a settlement with former defendant-below Bradley D. Knyal ("Knyal"). To that end, Plaintiffs released their claims against Knyal, as well as E3 and certain outside investors (A490-92, §§ 5-6), in exchange for a negotiated settlement payment (A490, § 3).

There was no settlement with Defendants-Below/Appellees WR Capital Partners, LLC, WR E3 Holdings, LLC, Henri Talerman and Frank E. Walsh III ("Defendants"). Accordingly, Plaintiffs did not release or otherwise part with their legal claims against Defendants, and they were not given any consideration therefrom. This arrangement was memorialized in the sale documents, including the Settlement Agreement and Repurchase Agreement, that were executed by the parties on the same date.

Despite these agreements' clear language, which reflected the parties' unmistakable intent to preserve Plaintiffs' claims against Defendants, the Court of Chancery found that Plaintiffs' claims were not preserved. In doing so, the Court of Chancery rendered multiple bargained-for contractual provisions superfluous. The court below also rejected binding Supreme Court precedent holding that breach of fiduciary duty claims for economic dilution are personal claims that do not transfer

to the buyer in a sale of shares. The Court of Chancery erroneously dismissed Plaintiffs' unjust enrichment claim for the same reason.

Each of these holdings was reversible error, as Plaintiffs' opening brief on appeal shows. In their answering brief, Defendants fail to really grapple with Plaintiffs' arguments, instead parroting the Court of Chancery's flawed analyses. Defendants' positions, like the Court of Chancery's holdings, are untenable in light of Delaware's law of contractual interpretation and this Court's decisions holding that claims like those Plaintiffs assert here are personal claims.

This Court should reject Defendants' attempt to circumvent the parties' clear intent, reject the Court of Chancery's attempt to convert personal claims sounding in tort into non-personal claims attaching to shares of stock, and restore the parties to the positions they bargained for by allowing this litigation to proceed on the merits against Defendants.

ARGUMENT ON REPLY[1]

I. THE PLAIN LANGUAGE OF THE SALE DOCUMENTS ESTABLISHES THAT PLAINTIFFS RETAINED THEIR CLAIMS AGAINST DEFENDANTS

In their answering brief ("DAB"), Defendants argue that (1) the Repurchase Agreement, by which Plaintiffs sold their shares, did not incorporate by reference the Settlement Agreement; and (2) the Settlement Agreement did not retain with Plaintiffs the claims they assert here. (DAB 13-26.) Each of these contentions is without merit, and this Court should give effect to the plain meaning of the sale documents.

A. The Agreements Are Part Of An Integrated Transaction And Should Be Read Together

There is no dispute that the Settlement Agreement and Repurchase Agreement were executed at the same time, by the same parties, as part of the same transaction. Even Defendants acknowledge the agreements "were part of an integrated transaction." (DAB 21.)

Under Delaware law, "all writings that are part of the same transaction are interpreted together." *Trexler v. Billingsley*, 166 A.3d 101 (Table), 2017 WL 2665059, at *4 n.21 (Del. June 21, 2017) (citing Restatement (2d) of Contracts § 202(2) (1981)). This principle is firmly engrained. *See*, *e.g.*, 11 Williston on

[1] Capitalized terms not defined herein shall have the meaning ascribed to them in Appellants' Opening Brief ("AOB").

Contracts § 30:25 (4th ed. July 2019 Update) ("Generally, all writings which are part of the same transaction are interpreted together."); *Crown Books Corp. v. Bookstop, Inc.*, 1990 WL 26166, at *1 (Del. Ch. Feb. 28, 1990) ("[I]n construing the legal obligations created by [a] document, it is appropriate for the court to consider not only the language of that document but also the language of contracts among the same parties executed or amended as of the same date that deal with related matters."); 17A C.J.S. *Contracts* § 402 (2011 Dec. 2019 Update) ("Matters incorporated into a contract by reference are as much part of the agreement as if they had been set out in the contract verbatim.").

Here, the Settlement Agreement and Repurchase Agreement were negotiated together, executed at the same time (on August 31, 2018) and were intended and understood by the parties to be part of a single "integrated transaction." (DAB 21.) Each contract is therefore "part of the same transaction" and should be "interpreted together." *Trexler*, 2017 WL 2665059, at *4 n.21.

In response, Defendants argue this case is different and should be excepted from the rule because there are "conflicting provisions" in the Repurchase Agreement and Settlement Agreement. (DAB 21.) Specifically, they argue the contracts cannot be read together because they differ as to what rights Plaintiffs released with the sale of their E3 shares. (*Id.*)

There is no conflict here. Under section 1.01, Plaintiffs transferred all "right,

title and interest" in their shares, subject to certain terms and conditions. (A507, § 1.01; A524, § 1.01). Defendants do not dispute that Plaintiffs have transferred all of the valuable voting and economic rights inhering in their shares, excepting from this transfer only their legal claims against Defendants. (A494, § 10.) This carve-out is narrow and is permitted under Delaware law, which allows a party to transfer less than full rights in a security. 6 *Del. C.* § 8-302(b) ("A purchaser of a limited interest acquires rights only to the extent of the interest purchased.").

Defendants also invoke section 3.02(c) of the Repurchase Agreement in their effort to manufacture a conflict. (DAB 18.) Defendants argue that Plaintiffs cannot retain their legal claims because they agreed to deliver the shares free of "any Encumbrance" thereto. (A509, § 3.02(c); A526, § 3.02(c).) This argument misconstrues the meaning of an encumbrance.

The Repurchase Agreement defines "Encumbrance" to include a "mortgage, pledge, lien, charge, security interest, claim or other encumbrance." (A507, § 1.01; A524, § 1.01.) Hence, consistent with its usual meaning, an "Encumbrance" means a liability or obligation that may lessen the value of a share. *See Black's Law Dictionary* 607 (11th ed. 2019) (defining "encumbrance" as "[a] claim or liability that is attached to property or some other right and that may lessen its value . . ."). The claims against Defendants are not an "Encumbrance" of the shares because they do not impose a liability or obligation on the holder—and Defendants have not

shown otherwise.

Defendants also argue the "[s]ubject to terms and conditions" modifier in section 1.01 only refers to terms and conditions in the Repurchase Agreement, not the Settlement Agreement. (DAB 18.) This position assumes the Settlement Agreement is not integrated and that its entire section 10 ("Preservation of Certain Claims, Defenses and Counterclaims") is mere surplusage. This would be an "absurd interpretation" of the parties' detailed contractual scheme and should be rejected. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1161 (Del. 2010).

At bottom, Defendants have not overcome "the rule that related contemporaneous documents should be read together." *Ashall Homes Ltd. v. ROK Entm't Grp. Inc.*, 992 A.2d 1239, 1250-51 (Del. Ch. 2010). The ruling below should be reversed.

B. By Its Terms, The Repurchase Agreement Incorporates The Settlement Agreement As Part Of The Parties' "Entire Agreement"

Lest there be any doubt, the straightforward contract language confirms the Settlement Agreement was integrated into the Repurchase Agreement. Section 8.06 of the Repurchase Agreement refers to the Settlement Agreement and purports to incorporate its terms as part of the parties' entire agreement: "This Agreement, the Settlement Agreement, the [other Repurchase] Agreement and the documents to be delivered hereunder and thereunder *constitute the sole and entire agreement of the*

parties to this Agreement with respect to the subject matter contained herein." (A516-17, § 8.06; A534, § 8.06 (emphasis added).)

Standing on its own, this language is sufficient to integrate the Settlement Agreement and Repurchase Agreement. "Where a written contract refers to another instrument and makes the terms and conditions of such other instrument a part of it, the two will be construed together as the agreement of the parties." *Star States Dev. Co. v. CLK, Inc.*, 1994 WL 233954, at *4 (Del. Super. Ct. May 10, 1994) (citation omitted). This standard is met here. The Repurchase Agreement "refers" to the Settlement Agreement and makes "such other instrument a part of it"—namely, part of the "sole and entire agreement of the parties . . . with respect to the subject matter contained herein."[2] *Id.*

Further, the fourth recital also refers to the Settlement Agreement: "WHEREAS, concurrently herewith, Seller is entering into a Settlement and Release (the 'Settlement Agreement') . . . pursuant to which, among other things, the parties thereto are releasing certain claims against each other." (A507, 524.)

Defendants argue that a recital is not a substantive part of a contract and the above recital should be ignored. (DAB 14-16.) That is not the law. The cases that

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[2] The last sentence of section 8.06 states that if there is a conflict between the Repurchase Agreement and any other writing, the former should govern. (A516-17, § 8.06; A534, § 8.06.) For the reasons herein, there is no conflict or inconsistency between the contracts.

Defendants attempt to distinguish are clear. A recital "may have a material influence in construing the contract and determining the intent of the parties," and should, so far as possible, "be reconciled with the operative clauses and be given effect." *TA Operating LLC v. Comdata, Inc.*, 2017 WL 3981138, at *23 (Del. Ch. Sept. 11, 2017) (citation omitted).

Defendants also invoke *In re Pyramid Operating Authority, Inc.*, 144 B.R. 795 (Bankr. W.D. Tenn. 1992). There, debtors argued that a lease and two other contracts relating to a former sports arena had been incorporated into a separate Management Agreement because the contracts were referenced in a recital. *Id*. at 812-13. Notably, unlike here, "the four (4) agreements were executed at four (4) different and distinct periods in time, with almost a year lapsing between execution of the [lease agreement] and the Management Agreement." *Id*. at 813. Further, "[n]owhere in the body of the Management Agreement" did it purport to incorporate the other contracts. *Id*. Under these circumstances, the Tennessee bankruptcy court properly rejected the doctrine of incorporation by reference.[3]

[3] A recent Delaware court relied on recitals to find that a corporation's charter and bylaws were incorporated into a subsequent indemnification agreement with the chief executive officer. *See Creel v. Ecolab, Inc.*, 2018 WL 5778130 (Del. Ch. Oct. 31, 2018). The court emphasized language in the recitals stating (1) the CEO had relied on the charter and bylaws in assuming her position; (2) the indemnification agreement was intended to provide "additional" protection beyond what was provided by the charter and bylaws; and (3) the indemnification agreement was "pursuant to and in furtherance of the Charter and Bylaws." *Id*. at *4-5.

Finally, Defendants argue that "caselaw supports Section 8.06's rejection of the incorporation by reference doctrine when the two contracts conflict," citing to *Karish v. SI International, Inc.*, 2002 WL 1402303 (Del. Ch. June 24, 2002). (DAB 20.) *Karish* affords no relief to Defendants. There, the parties executed two contracts, namely a (1) Management Agreement, and (2) LLC Agreement, both of which addressed how membership units were to be valued and the remedies available in the case of a breach. *Id*. at *1. Upon a valuation dispute, the Management Agreement allowed the parties to proceed in court, after first consulting a neutral appraiser, whereas the LLC Agreement contained a binding arbitration clause. *Id*. at *2.

Unlike here, the two contracts in *Karish* could not be reconciled because they contained opposing forum-selection clauses that could not both be given effect. Unable to harmonize the clauses, the Chancery Court followed the forum-selection clause in the LLC Agreement. No such impossible conflict exists here. Section 1.01 of the Repurchase Agreement, which states that Plaintiffs transfer their "right, title and interest" in the E3 shares, and section 10 of the Settlement Agreement, which decouples from this transfer only the claims against Defendants, can—and should—both be enforced.

C. Plaintiffs Retained And Did Not Transfer Their Claims Against Defendants

The Settlement Agreement directs that Plaintiffs' claims against Defendants are retained by Plaintiffs and shall not be "released" or "affected" by the sale of their shares. (A494, § 10.) The Court of Chancery circumvented this term by holding the Settlement Agreement did not come into effect until a "conceptual microsecond" after the Repurchase Agreement closed and the transfer of Plaintiffs' interest in their shares was complete. (Op. at 30-33.)

Section 10 ("Preservation of Certain Claims, Defenses and Counterclaims") is unambiguous. It states that "[n]othing in this Agreement shall affect any claims any of the Delaware Plaintiffs may have against [Defendants]." (*Id.*) It further adds that Plaintiffs do not release any of their claims against Defendants: "Nothing in the releases contemplated by this Agreement shall release any claims that any of the Delaware Plaintiffs has asserted or may assert against any of the [Defendants], whether derivative or otherwise . . . ." (*Id.*)

Defendants seek affirmance on the basis that the Settlement Agreement was "dependent upon and thus occurred after the closing of the Repurchase Agreement." (DAB 23.) This position is untenable and foreclosed by the plain language of the contracts.

First, section 1 states that closings under the Repurchase Agreement and Settlement Agreement shall occur simultaneously: "The closing under this

[Settlement] Agreement (the 'Closing') shall occur *simultaneously* with the closings under the Urdan Repurchase Agreement and the Woodward Repurchase Agreement." (A489-90, § 1 (emphasis added).) This language is unambiguous.

Defendants point out that section 1 goes on to say that the Settlement Agreement is "dependent upon closings under both the Urdan Repurchase Agreement and the Woodward Repurchase Agreement taking place." (*Id.*) This does not overcome the instruction that both closings shall occur "simultaneously." (*Id.*) Instead, the language that Defendants invoke simply means that the releases contemplated by the Settlement Agreement—namely, Plaintiffs' releases of Knyal, E3 and other shareholders —shall not take effect if the shares are never repurchased.

Second, the Repurchase Agreement states the parties are "concurrently herewith" entering into the Settlement Agreement: "WHEREAS, *concurrently herewith*, Seller is entering into a Settlement Agreement . . . pursuant to which, among other things, the parties thereto are releasing certain claims against each other." (A507, 524 (emphasis added).) This term reinforces that both contracts close at the same time.

In holding the Settlement Agreement closed a "conceptual microsecond" after the Repurchase Agreement closed, the Court of Chancery overlooked the foregoing

contract language. (A489, § 1; A507, 524.) Such language speaks directly to the timing of the closings and should not have been disregarded.[4]

D. Alternatively, The Contracts Are Ambiguous

At a minimum, the Repurchase Agreement and Settlement Agreement are ambiguous as to whether Plaintiffs preserved their claims. "When a contract is ambiguous, a court may look to extrinsic evidence as an aid to interpretation." *Meyers v. Quiz–Dia LLC*, 2017 WL 76997, at *7 (Del. Ch. Jan. 9, 2017).

Defendants contend that Plaintiffs have waived this issue on grounds that it was not raised until the motion for reargument. (DAB 26 (citing Del. Sup. Ct. R. 8).) This misstates the record. At oral argument on Defendants' motion to dismiss, the lower court raised the standing issue for the first time and invited each party to submit further briefing about whether Plaintiffs retained their direct claims in connection with the sale. (A364:23-69:22; A416:14-16:11.) Subsequently, the

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[4] Further, if the ruling below is affirmed, then section 10 ("Preservation of Certain Claims, Defenses and Counterclaims") would become superfluous. Defendants argue that section 10 should be understood to mean only that "Plaintiffs did not lose their ability to assert any claim as a result of the Settlement Agreement." (DAB at 24.) Under Defendants' reading (and their view of the distinction between personal and non-personal claims discussed further below), however, this section would become meaningless because there would not be any claims to preserve if all right, title and interest in the shares had already passed. Such an interpretation is strongly disfavored. *See Sunline Commercial Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 n.64 (Del. 2019) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." (citation omitted)).

parties submitted supplemental briefing addressing the interpretation of the sale documents. (A465-82; A540-51.) Plaintiffs addressed in detail the lawful interpretation of the contracts in the supplemental briefing. (A465-82.)

Accordingly, the record is sufficiently developed for the Court to analyze whether, as a matter of law, the contracts are ambiguous as to whether Plaintiffs retained their claims in the sale. Where, like here, an issue is "implicitly" raised below, this Court has rejected any waiver under Rule 8.[5] *See Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002).

As shown above, a reasonable interpretation is that Plaintiffs preserved, and did not release, their claims against Defendants. Dismissal for lack of standing is therefore improper at this stage. The lower court's decision should be reversed.

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[5] Separately, Rule 8 allows this Court to consider even a new issue "when the interests of justice so require." Del. Sup. Ct. R. 8.

II. THE COURT OF CHANCERY ERRED BY HOLDING THAT PLAINTIFFS' CLAIMS WERE NON-PERSONAL AND TRAVELLED WITH THE SHARES.

The Court of Chancery's decision must be reversed for the independent reason that, even if Plaintiffs did not retain their claims in the sale documents, Plaintiffs' claims for breach of fiduciary duty are personal claims that did not transfer with the sale of their shares. Defendants try to read out of existence the clear Supreme Court precedent requiring this conclusion, but as shown below, Defendants' efforts fail.

A. Defendants Cannot Distinguish *Schultz* And *Celera*, Which Control Here And Confirm That Plaintiffs' Breach Of Fiduciary Duty Claims Are Personal

Try as they might, Defendants cannot avoid *Schultz v. Ginsburg*'s clear holding that a breach of fiduciary duty claim for economic dilution "was personal," and that the corresponding "claim for damage suffered would remain with the Seller and not transfer to the Buyer." 965 A.2d 661, 668 (Del. 2009).[6] This holding, as confirmed in *In re Celera Corp. Shareholder Litigation*, 2012 WL 1020471, at *14 (Del. Ch. Mar. 23, 2012), *aff'd in relevant part*, 59 A.3d 418 (Del. 2012), requires reversal of the Court of Chancery's finding that Plaintiffs' fiduciary duty claims for economic and voting power dilution are non-personal.

Defendants do not dispute that, if *Schultz* controls, Plaintiffs' claims are personal and the Court of Chancery erred. Instead, Defendants argue that *Schultz*

[6] Defendants refer to *Schultz* as "*PHLX II*."

does not control because it "was decided based on the specific facts of that case and is not applicable here." (DAB 30.) Defendants attempt to distinguish *Schultz* on two bases. Neither makes sense.

First, Defendants note that the plaintiffs in *Schultz* sought rescission of stock sales rather than money damages. This distinction makes no difference: the *relief* a plaintiff seeks does not affect whether the alleged *breach* is of a personal right or of a right "in the security itself." *Schultz*, 965 A.2d at 667 n.12. Defendants do not argue otherwise; they instead suggest that the money damages Plaintiffs seek here would not "put the [Plaintiffs] back to where they were at the time of the transactions." (DAB 32.) But that is exactly what money damages would do: they would compensate Plaintiffs for Defendants' dilution of their shares by paying Plaintiffs the difference between the value of their pre-dilution holdings and the value of their post-dilution holdings. Plaintiffs' pursuit of money damages here is perfectly proper, will lead to an equitable result, and does not make their claims any less personal.

Second, Defendants argue that *Schultz* does not apply because "it was decided in connection with approval of a class settlement and the allocation of the settlement, not a dispositive motion on the merits like here." (*Id.*) But this distinction is likewise immaterial; a case's procedural posture does not change the analysis of whether the claims asserted in the case are personal or non-personal. Indeed, the *Activision*

decision on which Defendants (and the Court below) rely so heavily was also a decision approving a settlement. *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1077 (Del. Ch. 2015).

Perhaps most telling is Defendants' concluding sentence on *Schultz*, in which Defendants say that the *Schultz* Court "did not purport to answer the question of whether dilution claims belonged ***only*** to the original PHLX stockholders (and not to their transferees)." (DAB 34 (emphasis added).) This phraseology concedes that, even under Defendants' reading, *Schultz* held that the original PHLX stockholders maintained their fiduciary duty claims.[7]

Defendants fare no better in attempting to distinguish *Celera*, instead repeating the same ineffective arguments they made about *Schultz*. But both *Schultz* and *Celera* squarely address the question of whether a fiduciary duty claim like the ones Plaintiffs brought here is personal, and both cases answer that question in the affirmative. (*See* AOB 32-35.) This ends the inquiry and requires reversal.

B. Defendants' Reliance On *Activision* Is Misplaced

Defendants next retreat to *Activision*, arguing that *Activision* correctly rejected *Schultz* in concluding that claims for breach of fiduciary duty were "property

[7] Defendants notably do not argue *Schultz* was wrongly decided, let alone ask this Court to overrule it; they instead just read *Schultz* so narrowly as to render it meaningless.

right[s]" that travelled with the shares. (DAB 36.)[8] But *Activision* was wrong to deem fiduciary duty claims "property rights" because, as explained in Plaintiffs' opening brief, fiduciary duty claims are *in personam* claims for breach of an equitable duty owed *by* a person (such as a controlling stockholder) *towards* another person (such as a minority stockholder). (AOB 33.) As *Activision* itself acknowledges, the "property rights" in shares that prior Delaware precedent and 6 *Del. C.* § 8–303(a) recognize as travelling with those shares include rights like "the right to vote [and] the right to compel payment of a contractually specified dividend." 124 A.3d at 1049-50 & n.13. It makes sense that both the common law and statutory law would create the rule that when a share of stock is sold, the voting rights and rights to dividend payments associated with that share would by default travel with the stock.[9]

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[8] Defendants also cite to *I.A.T.S.E. Local No. One Pension Fund v. Gen. Elec. Co.*, 2016 WL 7100493 (Del. Ch. Dec. 6, 2016), but *I.A.T.S.E.* does not aid them because it simply adopts *Activision*'s incorrect conception of the line between personal claims and non-personal claims.

[9] Similarly, claims for violation of a corporate charter provision have been deemed non-personal in decisions that *Activision* cites. *E.g.*, *In re Sunstates Corp. S'holder Litig.*, 2001 WL 432447, at *3 (Del. Ch. Apr. 18, 2001) ("The wrong is not to the stockholders individually but to a provision of the corporate charter designed to protect the dividend preference of the shares."). *Activision* erred by purporting to extend these decisions to apply to breach of fiduciary duty claims.

It makes far less sense that a claim for breach of an equitable duty owed to a stockholder would be deemed "property right" in the stock such that, upon its sale, the new stockholder would be responsible for pursing a remedy for a breach they did not suffer, and of which they may not even be aware. *Activision* erroneously construes fiduciary duty claims as such property rights without basis or citation, and in contradiction of *Schultz*.

Defendants also rely on *Activision* to support arguments that (1) by selling their shares, Plaintiffs "made a conscious business decision to sell their shares into a market that implicitly reflect[s] the value of the pending and any prospective lawsuits," 124 A.3d at 1044 (alteration in original) (citation omitted), and (2) that Plaintiffs "chose to dissociate their economic interests from the corporation and, by doing so, to forego the opportunity to benefit from" their claims. *Id.* at 1049 (citation omitted). Both of these arguments fail.

The first argument is factually incorrect because Plaintiffs did not sell their shares into a "market"; Plaintiffs sold their shares back to the Company as part of a partial settlement with former-defendant Knyal. E3 is closely-held; there is no public "market" that reflected the value of Plaintiffs' shares in light of pending or prospective lawsuits.

The second argument fails because the foregone "opportunity to benefit from" their claims only applies to the extent the remedy for the breaches would go to the

corporation, rather than to Plaintiffs individually. The case *Activision* cites for the "foregone opportunity" proposition, *In re Triarc Companies, Inc.*, 791 A.2d 872, 875 (Del. Ch. 2001), makes this clear by explaining that the opportunity to recover was foregone only because the claims "d[id] not support an award of monetary damages" and instead only merited equitable relief to the corporation—which the class members who had sold their shares could obviously not benefit from.

Defendants next attempt weakly to distinguish *Noerr v. Greenwood*, 2002 WL 31720734, at *4 (Del. Ch. Nov. 22, 2002), which is in accord with *Schultz* and *Celera*, on the basis that a disclosure claim for breach of fiduciary duty "arises outside of the relationship between the stockholder and the company." (DAB 37.) But this is incorrect because the duty of disclosure is simply a specific application of the duties of care and loyalty,[10] which obviously arise in the context of the "relationship between the stockholder and the company." Indeed, there is no such thing as a fiduciary duty claim that arises "outside of the relationship between the stockholder and the company," and yet Defendants acknowledge that some fiduciary duty claims are personal. (*Id.* 36-37.)

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[10] *See, e.g.*, *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 745 n.400 (Del. Ch. 2005) ("The Delaware Supreme Court has been clear that outside the recognized fiduciary duties of care and loyalty (and perhaps good faith), there are not other fiduciary duties. In certain circumstances, however, specific applications of the duties of care and loyalty are called for, such as . . . the duty of candor or disclosure.").

Finally, Defendants argue that Plaintiffs' fiduciary duty claims are solely derivative. (*Id.* 39.) This too is wrong, as Plaintiffs' claims clearly fit squarely within the paradigm of claims that can be asserted either directly or derivatively: Plaintiffs allege that Defendants leveraged their control to dilute Plaintiffs both economically and in terms of voting power.[11] But this Court need not answer the direct/derivative question to reverse the Court of Chancery for incorrectly rejecting *Schultz* and *Celera*. This Court can reverse and then remand to the Court of Chancery to address the direct/derivative question.

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[11] *See El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1263 (Del. 2016) (recognizing that dual-natured claims arise from "transactions that resulted in an improper transfer of both economic value *and* voting power from the minority stockholders to the controlling stockholder"); *see also* A260-A267.

III. THE COURT OF CHANCERY ERRED BY HOLDING THAT PLAINTIFFS LACKED STANDING TO BRING THEIR UNJUST ENRICHMENT CLAIM AND HOLDING THAT OTHER LEGAL FRAMEWORKS SUPERSEDE THE UNJUST ENRICHMENT CLAIM

As explained above and in Plaintiffs' Opening Brief, dismissal of the unjust enrichment claim was error for the same reasons that dismissal of Plaintiffs' breach of fiduciary duty claims was error. (*See supra* & AOB 32-44.) Defendants' reliance on the Court of Chancery's analysis of the fiduciary duty claim to justify dismissal of the unjust enrichment claim, therefore, fails.

Defendants do not dispute that Plaintiff may plead unjust enrichment alternatively to breach of fiduciary duty claims. *McPadden v. Sidhu*, 964 A.2d 1262, 1276 (Del. Ch. 2008) ("If plaintiff has pleaded and then prevails in demonstrating that the same conduct results in both liability for breach of [defendant]'s fiduciary duties and disgorgement via unjust enrichment, plaintiff then will have to elect his remedies."); *Breakaway Sols., Inc. v. Morgan Stanley & Co. Inc.*, 2004 WL 1949300, at *14 (Del. Ch. Aug. 27, 2004) ("[A]n unjust enrichment claim is not to be dismissed because it is pled in the alternative to the breach of contract claim."). Instead, Defendants argue that no unjust enrichment claim can survive because the Loan Agreement governed the parties' relationship.

Defendants are incorrect. Plaintiffs' unjust enrichment claim is not about the Loan Agreement; it is about the Defendants' threats and coercion, which forced Plaintiffs to enter into a *new transaction*—the 2017 Financing—not contemplated

by the Loan Agreement. Specifically, Plaintiffs allege that Defendants coerced them into entering into the 2017 Financing by wrongfully threatening to call an event of default (which they wrongfully manufactured) under the Loan Agreement. (*See, e.g.*, A042-A043.) This resulted in the transaction for which Plaintiffs bring an unjust enrichment claim. Thus, Plaintiffs' unjust enrichment claim fits squarely into the scenario where "[t]he contract itself is not necessarily the measure of [the] plaintiff's right [because] the [unjust enrichment] claim is premised on an allegation that the [2017 Financing] arose from wrongdoing . . . and the [defendant] has been unjustly enriched by the benefits flowing from the [2017 Financing]." *RCS Creditor Tr. v. Schorsch*, 2018 WL 1640169, at *7 (Del. Ch. Apr. 5, 2018) (first, second and sixth alterations in original) (citation omitted).

Because the unjust enrichment claim (1) is not derivative, for the same reasons the breach of fiduciary duty claim is not derivative, and (2) arises from the Defendants' coercive conduct rather than any contract governing the parties' relationship, the Court of Chancery's dismissal of that claim was error.

CONCLUSION

Plaintiffs respectfully request the Court to reverse the August 19, 2019 Memorandum Opinion and September 4, 2019 Order, and to remand this matter to the Court of Chancery for proceedings on the merits.

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CERTIFICATE OF SERVICE

I, Benjamin M. Potts, Esquire, hereby certify that on January 7, 2020, a copy of the foregoing document was served on the following counsel in the manner indicated below:

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